Supreme Court, U.S.
FILED
04-588 OCT 29 2004
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

RICHARD F. OLIVER

Plaintiff/Petitioner

vs.

LES BROWNLEE

Defendant/Appellee

On Petition For Writ of Certiorari
To The United States Federal Court
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

DR. RICHARD F. OLIVER
Pro Se Petitioner
2304 OXFORD SHIRE COURT
WALDORF, MARYLAND 20603
October 29, 2004

QUESTIONS PRESENTED IN THIS PETITION FOR A WRIT OF CERTIORARI

(1) Whether the United States Court of Appeals, Federal Circuit, erred when it would not provide a signed opinion in response to two formal requests by the plaintiff so that the petition could be procedurally reviewed by the Supreme Court.

(2) Whether the United States Court of Appeals, Federal Circuit, erred when it determined that the respondent had complied with the terms of the settlement and failed to reinstate the case.

(3) Whether the United States Court of Appeals, Federal Circuit, erred when it stipulated in a second ruling that the terms in the settlement agreement could be changed and failed to reinstate complaint and issue judgment in favor of plaintiff.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties to the case are contained on the front cover of the petition.

According to Supreme Court Rule 29(6) a plaintiff who was a government employee is not required to file a corporate disclosure statement. The plaintiff in this case contends that he was a government employee employed by a federal agency.

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STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

(1) The date the judgment and order sought to be reviewed was on August 8, 2004, which falls within 90 days.

(2) The Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 in that this represents an appeal from a final decision of the United States Appeals Court for the Federal Circuit.

(3) The Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 2072 in that the Court shall have the power to prescribe general rules of practice and procedure for cases in the United States district courts and court of appeals.

(4) The Court has jurisdiction of this appeal according to Article III, Section 1, Section 2(1), 2(2) and Amendments 1 and 5 of the United States Constitution.

(5) The Court has jurisdiction pursuant to Title VII of the Civil Rights Act of 1964.

(6) The Court has jurisdiction pursuant to Title VII of the Civil Rights Act of 1991.

(7) The Court has jurisdiction pursuant to the Small Business Job Protection Act of 1996.

(8) The complaint was derived from a federal question. This case is brought before this Court because the primary question raised by the plaintiff has been previously decided by this Court. The plaintiff raised federal questions to the United States Court of Appeals for the Federal Circuit from a complaint filed with the Merit Systems Protection Board.

The primary question before the Court is whether the United States Court of Appeals for the Federal Circuit should be required to render a signed judgment order/opinion when formally requested by the plaintiff in order to appeal to the Supreme Court and whether the refusal represents a violation of my 5th amendment rights. The plaintiff delivered requests for a copy a signed judgment on September 28, 2004 (Pet. App. 2-a) and October 15, 2004 (Pet. App. 3-a). On October 15, 2004 the United States Court of Appeals for the Federal Circuit sent a letter (Pet . App. 5-a) in which it states "There is no authority requiring a judge's signature to appear on an opinion. Your case was decided per curiam by a panel of judges on its merits. Therefore, your submissions are being returned without action."

Title 28 of The United States Code, Chapter 81 § 1254 provides

> "Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. "

This gives me the authority to file with the Supreme Court. Appellate jurisdiction has been conferred upon the Supreme Court by various statutes, under authority given Congress by the Constitution. The basic statute controlling the jurisdiction of the Supreme Court is this matter is found in Title 28 of the United States Code § 1251. The Supreme Court issued guidance in Pet. App 1-a, which advised the courts of the preponderance of opinions that are being returned without comment because they are unsigned. The plaintiff believes that the rulemaking power conferred on the Supreme Court by Congress in Title 28 United

States Code § 2071 and 2072 gave it authority to direct appeals court to sign unpublished opinions, to enable parties to appeal rulings to the Supreme Court. The plaintiff has been denied that right by the appeals court.

This case deals with the role of federal court in determining if settlements are legal, reinstatement rights for discrimination termination, and whether the court can enforce changed settlement terms that violate federal statutes on authorization of damage awards.

The Merit Systems Protection Board certified that a settlement agreement that denied the appellant from ever working for the Department of Defense and paying legal fees was lawful. After the MSPB Administrative Judge signed the initial decision and before the settlement became final, the plaintiff decided to seek reinstatement of the case. However, the Department of the Army had already issued the check to the attorney. After the plaintiff notified the attorney of the timely appeal, the attorney returned the check to the Federal Disbursing Center. However, the Department of the Army sought to reissue the check with a change to settlement terms during the time the plaintiff was exercising his appeal rights.

Once the United States Court of Appeals Federal Circuit upheld the settlement agreement as legitimate, the plaintiff had initially decided to accept the unsigned unpublished opinion. However, both the Department of the Army and the MSPB tried to influence the plaintiff into agreeing to a change of settlement terms. DA and the MSPB sought to have payments, authorized as legal fees, converted and issued in the plaintiff's name. The plaintiff clearly understood that while he accepted the Appeals court ruling, agreeing to changes in the settlement agreement, violated federal statute.

After the agency refused to issue the check in accordance with the settlement agreement for over a year, the plaintiff filed

a petition to reinstate the complaint because the Department of the Army had failed to execute the settlement. Issuing a check before the agreement was final and trying to influence the plaintiff to change an agreement violated the plaintiff's right to due process and a fair process during the appeal. If settlement agreements are treated as contracts, then the agreement must be executed in accordance with its terms. The MSPB and United States Appeals Court for the Federal Circuit have decided that where Title VII issues are represented and protected classes are involved, that the protected class will be treated differently and in violation of federal statutes.

These questions were timely raised before the MSPB and United States Appeals Court for the Federal Circuit and this court should have jurisdiction to review on a writ of certiorari. This case is brought to this Court on the claim that the plaintiff was a federal employee and his appeal is pursuant to 28 U.SC. §1291 in that this is an appeal from a final decision of the MSPB. The MSPB had jurisdiction pursuant to Title 5 of the United States Code §1201 . This Court has jurisdiction pursuant to Title VII of the Civil Rights Act of 1964, Title VII of the Civil Rights Act of 1991, and the Small Business Job Protection Act of 1996. The plaintiff is relying on a writ of certiorari for these reasons:

(1) The United States Court of Appeal for the Federal Circuit has entered a decision in conflict with the decision of another United States Court of Appeals on the same matter; has decided an important federal question in a way that is not consistent with a prior decision by the MSPB or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. The plaintiff's petition further requests that the Court exercise its supervisory power on whether the United States Court of Appeals for the Federal Circuit has an obligation to complete the judicial process and render a signed judgment order/opinion from the United States

Court of Appeals for the Federal Circuit to the plaintiff. The plaintiff requested a signed judgment order/opinion from the United States Court of Appeals for the Federal Circuit on two occasions. The response received the Appeals Court in Pet. App.5-a is not consistent with the Supreme Court guidance in that it specifies that " There is no authority requiring a judge's signature appear on an opinion. Your case was decided per curiam by a panel of judges on the merits". Since statistics from the United States Courts Administrative Offices indicate that approximately fifty percent of all unpublished opinions are signed. Therefore, it is presumed that the United States Federal Appeals Court Federal Circuit is exercising bias and denying my rights to a signed opinion due to the following: (1) The Federal Appeals Court Federal Circuit indicated that no signature was required on an opinion while the appeals court issues opinions with signatures; (2) The Federal Appeals Court Federal Circuit did not address my request to support a Supreme Court requirement to appeal; and (3) The Federal Appeals Court Federal Circuit returned my unsigned opinion with no action.

The MSPB or a United States Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. The plaintiff's petition is requesting that the Court direct the MSPB to reinstate and remand my EEO case for further processing. The petition further requests that the Court direct the Appeals Court that it can not direct a plaintiff to comply with settlement agreement changes that were not specified in its initial ruling on the settlement agreement. If the second unsigned opinion is unenforceable, then the first unsigned opinion is also unenforceable for the same reasons.

ARGUMENT AND AUTHORITIES

(A) A United States Court of Appeals has entered a unsigned decision in conflict with a decision of another United States Court of Appeals or the Supreme Court guidance on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power.

(B) A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The questions presented to this Court are;

(1) Whether the United States Court of Appeals, Federal Circuit, erred when it failed to provide a copy of a signed opinion in respond to two requests by the plaintiff to be provided a signed order/opinion from the court to support the Supreme Court appeal. The United States Court of Appeals for the Federal Circuit committed clear and reversible error when it proposed and provided an unsigned judgment order/opinion to the plaintiff. The Appeals court knew or should have known that this Court would not review an unsigned unpublished opinion. The Court has publicly displayed on its official website that unsigned judgments/order opinions will not be reviewed with any comment. (Pet. App. 1-a). The Court in its response to my request, states that " There is no authority requiring a judge's signature to appear on an opinion". That statement is not consistent with the fact that approximately fifty percent of

unpublished opinions issued by the courts are signed by judges. When I specifically requested my opinion to be signed by a judge to fulfill a Supreme Court requirement, the court indicated that there was no authority and returned my unsigned unpublished opinions to me.

Equal justice under the law is the ultimate responsibility of the Supreme Court of the United States. As the final reviewer of the law, the Court ensures that United States citizens like me, the promise of equal justice under law. To that end the Supreme Court in this system derives its authority to review cases and issue opinions on cases that conflict with individual's constitutional rights.

This authority was issued under the function of judicial review and clarified in *Marbury v. Madison, 5 U.S. 137 (1803)* that asserts the Court's responsibility to overturn unconstitutional legislation. The Constitution restricts the Court to cases and controversies. However, *McCullock v. Maryland, 17 U.S. 316 (1819)* gives the court broad authority to execute its responsibility based on changing conditions. In this case, the Court has the authority to issue guidance to the appellate courts to sign opinions for review by the Court. Refusing to provide that signed opinion to comply with the Supreme Court's authority is a constitutional violation.

The United States Court of Appeals Federal Circuit has violated my Fifth Amendment rights not to be deprived of life, liberty, or property without due process of law. The most basic right protected under the due process doctrine is the right to be given notice, and an opportunity to be heard. The Appellate Court's refusal to sign my opinion to support review by the Supreme Court violates that basic right. Further, the appellate courts' practice of screening opinions and selectively signing unpublished opinions violates the equal justice doctrine. There is a separate and unequal level of appellate review in the federal appeals courts. The principle of separate and unequal was

addressed in *Brown v. Board of Education of Topeka, 347 U.S. 483(1954).* This case established the doctrine that separate institutions were inherently unequal. The Court decision in Brown v. Board of Education banned racially segregation in public schools. This landmark ruling started a long process of desegregating schools and institutions.

(2) Whether the United States Court of Appeals, Federal Circuit, erred when it determined that the respondent had complied with the terms of the settlement. According to the record the Appeal's Court states that the settlement was entered as follows, "After the settlement was entered, but before the Board ruled on Mr. Oliver's petition for review, the Army attempted to make the $20,000 to Mr. Oliver's lawyer, Kenneth Robinson, made payable to The Robinson Law Firm." The Appeals court also states that,

> "Mr. Oliver contends that by failing to make the agreed-upon $20,000 payment the Army has not satisfied its obligations under the settlement agreement. In essence, Mr. Oliver appears to contend that the settlement agreement did not take effect until February 23, 2001, when the administrative judge's initial decision approving the settlement agreement became final, or some later date when his rights to appellate review of that decision were exhausted."

However, the official record shows that the MSPB Administrative Judge states that "The initial decision will become final on February 22, 2001, unless a petition for review is filed by that date or the Board reopens the case on it own motion". The plaintiff properly filed a timely appeal as acknowledged by the MSPB court. The check, which the MSPB and Appeals Court referenced in their rulings, is clearly dated February 16, 2001. The check is dated before the initial decision is final, and no check was issued after the Appeals Court ruling and appeals rights were exhausted on July 1, 2002. Therefore,

the Department of the Army did not satisfy the settlement requirements in a timely and legal manner. The Appeals court erroneously states that " Mr. Oliver does not provide any support for his contention that the settlement agreement took effect only after the initial decision became final or the petition for review was denied. By its terms, the settlement agreement took effect when it was signed." The settlement agreement as a matter of law could not be executed until it became final. The settlement agreement is treated as a contract. The contract terms specified that the plaintiff had thirty days to appeal the settlement before becoming final. The agreement did not become final until the plaintiff exhausted his appeal rights. Once the plaintiff exhausted his appeal rights, the clock started to execute the terms of the settlement agreement.

Refer to *Greco v. Department of the Army, 852 F. 2d 558, 560 (Fed. Cir.)* which stipulates that because a settlement agreement is a contract, the enforcement provision relevant to a settlement agreement should be reviewed in accordance with contract law. Both the MSPB and United States Federal Court Federal Circuit committed err in that review. The MSPB in its terms made the finality and enforcement of the settlement conditional on a 30-day period during which the appellant can petition the Board under certain conditions. The Department of the Army, MSPB, and Appeals Court assert that the Department of the Army's actions were lawful in disbursing the check before the settlement became final. However, none of the agencies sought to allow or support the attorney's retention and negotiation of the check while the appeal rights were being exercised.

The party that challenges the legality and validity of a settlement agreement carries a heavy burden and must show that the settlement is unlawful, was involuntary, or was the result of fraud or mutual mistake. Refer to Wade v. Department of Veteran Affairs, 61 MSPB 580, 583 (1994). The check disbursement and effort to have me involved in the unlawful

reprogramming of fees are material breaches of the contract or settlement terms.

The appeals court was incorrect in stating that the respondent can satisfy the settlement terms at the same time the plaintiff is exercising his appeal rights. Title VII victims are entitled to the same due process and fairness rights that other victims of civil rights violations enjoy.

(3.) Whether the United States Court of Appeals, Federal Circuit, erred when it stipulated that requirements in the settlement agreement could be changed. After issuing the check to " The Robinson Law Firm" with no social security or taxpayer identification number and with no record of tax withholding, before the settlement became final, the plaintiff determined it would follow the ruling of the Appeals court in the issuance of the settlement payment. When the plaintiff originally challenged the settlement agreement, the United States Court of Appeals for the Federal Circuit upheld the legality of the settlement agreement based on its existing terms in a ruling dated April 2, 2002. After the plaintiff exhausted his appeal rights, the Department of the Army failed to issue a settlement payment based on the Court of Appeals ruling dated April 2, 2002 for over a year.

The Department of the Army continuously tried to get the plaintiff to change the terms and conditions of the agreement but the plaintiff referred the Department of the Army back to the April 2, 2002 unsigned unpublished opinion for enforcement of the settlement agreement. The Appeals court in their August 6, 2004 unsigned unpublished opinion stated that it is the plaintiff's fault that the settlement agreement was not enforced. The plaintiff provided no opposition to the Army enforcing the agreement based on the terms and the Federal Appeals Court ruling. Since the agreement was based on payment of attorney's fees and no other damages were accounted for in the agreement,

there are legal implications if attorney's fees are converted to other types of awards such as compensatory damages, etc. Neither the Department of the Army, Merit System Protection Board, nor Federal Appeals court provided any statutory basis on which the plaintiff should concur with these changes. The plaintiff and his non-attorney representative have been subjected to a pattern of coercion by the MSPB and the Department of the Army to agree to changes in the settlement agreement, in violation of statutes on fees.

When a party to a settlement agreement materially breaches the agreement, the non-breaching party may elect either to enforce the agreement or to rescind the agreement and reinstate the appeal. *Pierson v. Department of the Army*, 86 M.S.P.R. 202, 205 ¶ 5 (2000). The appellant has indicated that he would like to rescind the agreement and reinstate his appeal. Compliance Referral File, Tab 2. The agency has not responded to the Recommendation. Therefore, rescission of the agreement and reinstatement of the appeal is the appropriate remedy for the agency's material breach. *Pierson*, 86 M.S.P.R. at 206 ¶ 6

REASONS FOR GRANTING PETITION

While the Supreme Court has put guidance on the Supreme Court web site that it will not review unsigned opinions, it is clear from reported statistics that unsigned appellate rulings are an increasing problem in the Federal court system. We ask the Supreme Court to take the issue head on because of the impact it has on the general public and the perception that it brings when the public cannot trust rulings issued by the courts. The primary question is why the federal appeals courts are issuing any opinions that are not signed by Federal judges.

In the interest of justice, I request the Supreme Court grant the petition. Since the appellate courts issue unpublished signed opinions and a signed copy was formally requested for review by the Supreme Court, the plaintiff concludes that there are two reasons: the case was not properly reviewed by a panel of appellate judges or the panel of judges determined that they would exercise final appellate review. In either case, my rights were violated. The Supreme Court has the authority to require signatures on appeals that it reviews and issue guidance to the appellate courts to comply. The Federal Appeals court violated that guidance and asserted itself as the final level of review in violation of my constitution rights.

If plaintiffs are: filing supreme court petitions under the mistaken impression that their appeals are endorsed by federal appeal judges; filing supreme court petitions when appellate courts refuse to provide signed copies of opinions; and filing supreme court petitions when appellate court fail to respond to requests for signed opinions to support supreme court petitions, are problems that the Supreme Court should address. These opinions represent an obstruction to due process. There are thousands of unsigned and unpublished opinions at the appellate

level as reported by the U.S. Administration of Courts. The appellate courts' actions interfere with the statutory review requirements imposed on the Supreme Court by Congress and the Constitution.

In my case there were two unpublished and unsigned opinions issued on different aspects of the same issue of settlement. On September 28, 2004 I filed a request to United States Federal Appeals Court Federal Circuit. After two weeks, I received no response to my request and the docket sheet reflected that no request was made. In my follow-up request filed October 15, 2004, the chief judge was contacted because timeliness was an issue. I wanted to ensure that my request for a copy of the signed opinion was entered in the official court record. The official response indicated that there is no authority for a judge's signature on the opinion.

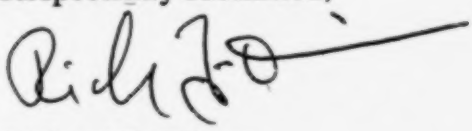
While I did not challenge the first unsigned appeal ruling, I believed it was properly issued by Federal appeals judges. The MSPB and Department of the Army sought to influence me and my non-attorney representative to change the terms of the settlement rather than enforce the terms of the agreement based on the 2001 unsigned Federal Appeals opinion. Once the second unsigned opinion was issued, the Supreme Court web site was reviewed for guidance on unsigned opinions.

This issue crosses all circuits and violates the right to equal justice and treatment. While the Supreme Court has issued guidance that it will not review unsigned opinions, it has not stopped these unsigned opinions from being issued by the appellate courts. The fact that the Supreme Court issued guidance on reviewing these opinions indicates that this issue is of concern to the Supreme Court. In the interest of justice, I request the Supreme Court accept my petition for review.

CONCLUSION

The plaintiff has shown in this petition that the United States Court of Appeals for the Federal Circuit has violated the plaintiff's rights according to Article III, Section 1, Section 2(1) and Amendment 5 of the United States Constitution. The plaintiff also has show that his rights have been violated according to Title VII of the Civil Rights Act of 1964, Title VII of the Civil Rights Act of 1991, and the Small Business Job Protection Act of 1996. The plaintiff has shown that within the Appeals Court for the Federal Circuit rulings issued by the same circuit on the same case are inconsistent. The plaintiff is requesting from the Court to exercise its supervisory powers to ensure that the plaintiff receives judicial process according to the United States Constitution. The plaintiff seeks the Court to review his petition on 5th amendment grounds and to reinstate his MSPB Title VII employment discrimination termination case.

Respectfully submitted,



Richard F. Oliver

APPENDICES

Appendix A

Supreme Court of the United States

2003 TERM COURT ORDERS

The vast majority of cases filed in the Supreme Court are disposed of summarily by unsigned orders. Such an order will, for example, deny a petition for certiorari without comment. Regularly scheduled lists of orders are issued on each Monday that the Court sits, but "miscellaneous" orders may be issued in individual cases at any time. Scheduled order lists are posted on this Website on the day of their issuance, while miscellaneous orders are posted on the day of issuance or the next day.

9/25/04

http://www.supremecourtus.gov/orders/03ordersofthecourt.html

Appendix B

3785 Primrose Court
Waldorf, Maryland 20602
September 27, 2004

court stamp filed 9/28/2004

United States Court of Appeals
for the Federal Circuit
717 Madison Pl., NW
Attention: Jan Horbaly, Clerk
Washington, DC 20439
(202) 633-6550

Dear Clerk Horbaly:

This is in reference to Appeals Case 04-3175, Richard F. Oliver, petitioner, versus, Department of the Army, respondent. I have decided to exercise my right to appeal the judges' unpublished appeals court ruling to the Supreme Court.

To accomplish that, I request a copy of the opinion /order signed by one of the judges. I believe that this is consistent with the requirements by the Supreme Court for appellate review. The copy that I received is unsigned (enclosed).

Your cooperation in this matter is appreciated. Because of the suspense for filing my appeal your timely response is appreciated.

Enclosure

Respectfully Yours,

cc: David R. Feniger

/S/Dr. Richard F. Oliver

Appendix C

2304 Oxford Shire Court
Waldorf, Maryland 20603
October 13, 2004

Court stamp filed 10/15/2004

Chief Judge Mayer
United States Court of Appeals for Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

Subject: Correcting
federal appeals record for
Oliver v. Army 04-3175

Dear Judge Mayer:

This is in reference to my request for a signed copy of the opinion issued on my case (Exhibit 1). While the federal appeals court has the right not to respond to my request for a signed copy of my opinion, the request is being made in accordance with Supreme Court guidance.

Exhibit 2 provides a copy of the current docket sheet, which shows that the court has not acknowledged receipt of my request. It is important that I have an accurate record of my request for a signed opinion for the record. I am also concerned because the court in another case 02-3039 has also failed to include specific documents in my record, while indicating that they would be included in the file. Exhibit 3 is a copy of the docket sheet. The records on FOIA request has a statutory basis,

that I have been able to find in the federal documents. I have been unable to find the basis for the other responses provided (Exhibit 4). My concern deals with the fact that both United States Appeals Court Federal Circuit opinions for the federal circuit (04-3175 and 02-3039) are unsigned and unpublished opinions that are contrary to the Supreme Court guidance.

I respectfully ask that the record be corrected to show that I sought a signed opinion on September 28, when the request was acknowledged.

Enclosures

Respectfully Yours

/S/ Richard F. Oliver
Richard F. Oliver

Appendix D

United States Court of Appeals
For the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

October 15,2004

Richard Oliver
Oxford Shire Court
Waldorf, Maryland 20603

RE: Oliver v. Army, 04-3175

Dear Mr. Oliver:

This is in response to your submissions dated September 27, 2004 and October 13, 2004 requesting a signed copy of the court's opinion issued on August 6, 2004.

There is no authority requiring a judge's signature appear on an opinion. Your case was decided per curiam by a panel of judges on the merits.

Therefore, your submissions are being returned without action.

Very truly yours,
/s/ Jan Horbaly/JB
Jan Horbaly
Clerk

JH/jb
Enclosures
cc: David R. Feniger, Esg.

Appendix E

Case Details
U.S. Court of Appeals for the Federal Circuit
OLIVER V. ARMY
04-3175

Date	History
4/27/2004	Appellant Principal Brief Filing Date
5/21/2004	Appellee or Cross Appellant Principal Brief Filing Date
/ /	Appellant Reply Brief Filing Date
/ /	Cross Appellant Reply Brief Date
5/21/2004	Appendicies Filing Date
8/5/2004	Calendared
8/6/2004	Disposition: AFFIRMED; PANEL
9/27/2004	Mandated on
	Please Note: The briefs above are only the most current.
---	Please Note: Motions & Actions Filed are listed first. Entries are listed last
	Entries for Case Number: 04-3175
Entry 8:A	10/15/2004: CLERK'S LETTER TO PETITIONER RE SUBMISSIONS DATED 9/27/04 AND 10/13/04 – THERE IS NO AUTORITY REQUIRING A JUDGE'S SIGNATURE APPEAR ON AN OPINION. THEREFORE, YOUR SUBMISSIONS ARE BEING RETURNED WITHOUT ACTION.

Entry 7:A	10/15/2004: PETITIONER'S REPETITIVE REQUEST FOR A SIGNED COPY OF THE COURT'S OPINION ISSUED ON AUGUST 6, 2004.
Entry 6:A	9/28/2004: LETTER OF PETITIONER REQUESTING FOR A SIGNED COPY OF THE COURT'S OPINION ISSUED ON AUGUST 6, 2004. SERVICE: by Mail on 9/27/2004
Entry 5: A	6/29/2004: RECD LTR FROM PETITIONER INDICATING THAT HE WOULD LIKE TO HAVE TO OPPORTUNITY TO RESPOND TO ANYTHING FROM THE RESPONDENT, HAS NOT RECEIVED ANYTHING FROM THE RESPONDENT. (DEPUTY CLERK NOTED) SERVICE: by Mail on 6/24/2004
ENTRY 3: A	4/20/2004: LETTER FROM PETITIONER CONFIRMING THE DUE DATE OF THIS INFORMAL BRIEF. PETITIONER'S INFORMAL BRIEF DUE APRIL 29, 2004. SERVICE: by Hand on 4/20/2004
ENTRY 2: A	4/9/2004: CERTIFIED LIST FROM MSPB. SERVICE: by Mail on 4/5/2004

ENTRY 1:A 3/29/2004: PETITIONER'S FEDERAL STATEMENT CONCERNING DISCRIMINATION (SELECTED #1)
SERVICE: by Court on 3/29/2004

PACER Service Center
Transaction Receipt

10/20/2004 10:55:15
PACER Login Client Code
Description: dkt detail Search Criteria: 04-3175

Appendix G

Note: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

04-3175
Richard F. Oliver,
Petitioner,
v.
DEPARTMENT OF THE ARMY,
Respondent.

DECIDED: August 6, 2004

Before Michel, Circuit Judge, Archer, Senior Circuit Judge, and Bryson, Circuit Judge.

PER CURIAM

DECISION

Petitioner Richard F. Oliver appeals from a decision of the Merit Systems Protection Board, Docket No. DC-0752-0009-C-1, denying his petition to enforce a settlement agreement with the respondent Department of the Army. We affirm.

BACKGROUND

Mr. Oliver was a civilian employee of the Department of the Army until September 2000, when the Army removed him from his position. Mr.

Oliver appealed his removal to the Merit Systems Protection Board. The appeal was ultimately resolved with a settlement agreement that the parties entered into in December 2000. Under the settlement agreement, Mr. Oliver was allowed to resign for personal reasons, and the Army agreed " to pay $20,000 as a lump sum for Appellant, (Check made payable to The Robinson Law Firm) within 60 days of the execution of this Agreement." In return, Mr. Oliver agreed to "withdraw with prejudice this appeal and all equal employment opportunity complaints based on events dated on or before the signing of the Agreement." He also agreed never again to seek employment with the Army. The Board entered the settlement agreement into the record and dismissed the appeal. Mr. Oliver then petitioned for review, alleging that his lawyer had coerced him into agreeing to the settlement agreement and that the administrative judge who presided over the appeal was biased against him. The Board denied his petition for review, and we subsequently affirmed the Board's decision, Oliver v. Dep't of the Army, 33 Fed. Apps 488 (Fed. Cir. 2002).

After the settlement was entered, but before the Board ruled on Mr. Oliver's petition for review, the Army attempted to make the $20,000 referred to in the settlement agreement. In February 2001, the Army sent a check for $20,000 to Mr. Oliver's lawyer, Kenneth Robinson, made payable to The Robinson Law Firm. Because Mr. Oliver had fired Mr. Robinson as his lawyer by that time, however, Mr. Robinson returned the check to the Army. After the Board denied Mr. Oliver's petition for review, the Army contacted Mr. Oliver by letter, with copies to his former lawyer and his new representative, Ms. Ellen Dunn, requesting

instructions on who to pay the $20,000. The letter noted that The Robinson Law Firm was no longer representing Mr. Oliver and that the terms of the settlement agreement required the Army to make the check payable to The Robinson Law Firm. Mr. Oliver responded to the letter by instructing the Army not to have further contact with Mr. Robinson and stating "(s)ince I have sixty days to appeal the MSPB decision, you have no right to advise me or seek information about the settlement check". Mr. Oliver did not advise the Army about how to make the $20,000 payment.

After our decision in Oliver v. Dep't of the Army, 33 Fed. Appx. 488 (Fed. Cir. 2002), upholding the settlement agreement, the Army once again contacted Mr. Oliver in a letter addressed to him, to his former attorney (Mr. Robinson), and to Ms. Dunn. The letter stated that the Army was prepared to reissue the $20,000 check and requested that the three consult among themselves and advise the Army about who should be the payee on the check. In response to that letter, Mr. Oliver did not provide the requested instructions, but instead charged that the Army had acted improperly by contacting Mr. Robinson.

Mr. Oliver then filed a petition to enforce the settlement agreement, contending that the Army had breached the settlement agreement by not issuing the payment as prescribed in the settlement agreement. As a remedy for the alleged breach, Mr. Oliver sought to have the settlement agreement set aside and the original appeal of this removal reinstated. The administrative judge denied the petition, finding that "the agency has repeatedly attempted to comply with the agreement, by first

tendering the $20,000 check addressed in term 2 of the settlement agreement to the appellant's then attorney of record, and after it was returned by him directing the question of payment to the appellant himself, in writing on 2 subsequent, in an effort to made said payment." Based on those findings, the administrative judge concluded that Mr. Oliver's claims concerning the Army's alleged failure to pay the $20,000 as required by the settlement agreement were frivolous.

Mr. Oliver petitioned for review of the administrative judge's decision, but the Board denied the position. Mr. Oliver has now petitioned this court for review.

DISCUSSION

Mr. Oliver contends that by failing to make the agreed-upon $20,000 payment the Army has not satisfied its obligations under the settlement agreement. In essence, Mr. Oliver appears to contend that the settlement agreement did not take effect until either February 23, 2002, when the administrative judge's initial decision approving the settlement agreement became final, or some later date when his rights to appellate review of that decision were exhausted. Mr. Oliver argues that the Army was required to comply with the terms of the agreement, presumably by sending a check payable to The Robinson Law Firm after the settlement took effect. Although the Army sent a check for $20,000 to the Robinson Law Firm, Mr. Oliver's complaint is apparently that the check was sent too soon and that the Army breached the settlement agreement by not making that same payment after either February 23, 2001, or at some point after September 2001.

Mr. Oliver does not provide any support for his contention that he settlement agreement took effect only after the initial decision became final or the petition for review was denied. By its terms, the settlement agreement took effect when it was signed. For example, the settlement agreement provides that Mr. Oliver agreed " to withdraw with prejudice this appeal and all equal employment opportunity complaints based on events dated on or before the signing of this Agreement." Moreover, the settlement agreement required that several of its terms be fulfilled shortly after the agreement was executed. In particular, the agreement required the Army to pay Mr. Oliver "within 60 days of the execution of this agreement." If the Army had waited until one of the dates proposed by Mr. Oliver as the effective date of the agreement, the Amy would have been out of compliance with its obligations under the agreement.

Mr. Oliver does not dispute that shortly after the execution of the settlement agreement the Army sent a check to The Robinson Law Firm for $20,000. Mr. Robinson returned that payment because Mr. Oliver had fired him, presumably causing Mr. Robinson to question the authority to accept the payment. Mr. Oliver does not dispute that the Army twice asked Mr. Oliver for instructions about how to make the payment in a manner that he would accept in light of the fact that he had fired his attorney. The letters sent by the Army make clear that the Army stood ready to make the payment in any appropriate manner as directed, but that Mr. Oliver refused to give the Army instructions as to an acceptable method by

which it could make the payment and not be subject to a later claim that it had not paid the proper party.

Under these circumstances, we conclude that the Board had substantial evidence to conclude that the Army has attempted to comply with the agreement and that its failure to so do up to this point has been the fault of Mr. Oliver. As such, the Board properly concluded that Mr. Oliver has not met his burden of establishing that the Army has breached the settlement agreement.

It also appears that Mr. Oliver may be calling the validity of the settlement agreement itself into question. Addressing that issue, the administrative judge concluded that "there is no evidence of record that raises a question as to the agreement's validity." Mr. Oliver has not pointed to any evidence that suggests that the administrative judge erred in reaching that conclusion. Accordingly, to the extent that Mr. Oliver is challenging the validity of the settlement agreement, we uphold the administrative judge's decision ruling that Mr. Oliver has failed to show that the settlement agreement is invalid.

Appendix H

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 08/06/04

The attached opinion announcing the judgment of the court in you case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Costs are taxed against the Petitioner(s) under Rule 39. The party entitled to costs is provided a bill of costs from and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of cost will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Cost should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion otherwise. Sanctions should be paid in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34 (g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

JAN HORBALY
Clerk

cc: RICHARD F. OLIVER
DAVID R. FENIGER

OLIVER V. ARMY, 04-3175
MSPB – DC0752010009-C-1

Appendix I

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

02-3039
RICHARD F. OLIVER,
PETITIONER
V.
DEPARTMENT OF THE ARMY,
RESPONDENT,

DECIDED: APRIL 2, 2002

Before SCHALL,BRYSON, and GAJARSA, Circuit Judges.
PER CURIAM.

DECISION

Richard F. Oliver petitions for review of the decision of the Merit Systems Protection Board ("Board"), No. DC 0752-01-0009-1-1, denying his petition for review of an earlier Board decision that dismissed his appeal as settled. We affirm.

DISCUSSION

I.

Mr. Oliver was a civilian employee of the Army until September of 2000, when the Army removed him for misconduct. He appealed his

removal to the Board. Eventually, the parties settled the case. Under the settlement, Mr. Oliver was allowed to resign "for personal reasons," and the Army agreed to tell prospective employers that was why he had resigned. The Army also agreed to pay Mr. Oliver $20,000, which sum was to cover any all attorney fees. For his part, Mr. Oliver agreed to withdraw his appeal and never again seek employment with the Army. After the administrative judge ("AJ"), entered the settlement agreement into the record and then dismissed the appeal, Mr. Oliver petitioned for review, arguing that he was misled and coerced by his lawyer into settling, that the AJ was biased against him, and that he was denied discovery to which he was entitled. The Board denied his petition, and this appeal followed.

II.

Our scope of review in an appeal from a decision of the Board is limited. Specifically, we must affirm the Board's decision unless we find it to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule or regulations having been followed; or unsupported by substantial evidence. 5 U.S.C. § 7703(c); Kewley v. Dep't of Health & Human Servs., 153 F.3d 1357, 1361 (Fed. Cir. 1998).

Mr. Oliver seeks to have his settlement agreement set aside. Such a petitioner has the "heavy burden" of establishing the invalidity of the settlement agreement. Asberry v. United States Postal Serv., 692 F.2d 1378, 1380 (Fed. Cir. 1982). "It is well established that in order to set aside a settlement, an appellant must show that the agreement is unlawful, was involuntary, or was the

result of fraud or mutual mistake." Sargent v. Dep't of Health & Human Servs., 229 F.3d 1088, 1091 (Fed. Cir. 2000).

Mr. Oliver contends that he was coerced into signing the settlement agreement by the actions of his attorney. He also contends that his attorney agreed to withdraw his request for discovery without his consent. However, a litigant is bound by the consequences of his attorney's conduct. See Rowe v. Merit Sys. Prot. Bd., 802 F2d 434, 437 (Fed. Cir. 1988); Massingale v. Merit Sys. Prot Bd., 802 F.2d 434, 437 (Fed. Cir.1988); Massingale v. Merit Sys. Prot. Bd., 736 F.2d 1521, 1523 (Fed. Cir. 1884). Furthermore, the record does not suggest coercion on the part of Mr. Oliver's attorney.

Mr. Oliver also contends that the AJ exhibited judicial bias by denying his right to discovery. We see nothing in the record to support Mr. Oliver's claim of judicial bias. To the contrary, the record shows that the AJ ordered the Army to respond to Mr. Oliver's discovery motion in a prompt manner. The record also shows that the AJ carefully advised Mr. Oliver and his Attorney regarding the status of the proceedings. The parties themselves agreed to withdraw all outstanding motions to compel discovery while they pursued a settlement, and Mr. Oliver himself signed the settlement agreement which mooted any discovery issues.

Mr. Oliver also contends that the settlement agreement was improper because (i) his attorney did not sign the settlement agreement before Mr. Oliver was asked to sign; and (ii) the Army improperly failed to place both his name and his attorney's name on the $20,000 settlement check.

We have considered both of these contentions and have determined them to be without merit. For the foregoing reasons, the final decision of the Board is affirmed. No costs.

CERTIFIED COPY
I HEREBY CERTIFY THIS DOCUMENT
IS A TRUE AND CORRECT
COPY OF THE ORIGINAL ON FILE

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appendix J

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT
ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED:
04/02/02

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

No costs were taxed in this appeal.

Regarding exhibits and visual aids; Your attention is directed FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

JAN HORBALY
No Signature
Clerk

cc: RICHARD F. OLIVER
MARIAN E. SULLIVAN

OLIVER V. ARMY 02-3039
MSPB – DCO7520100009-I-1

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

02-3039
RICHARD F. OLIVER,
Petitioner
v.
DEPARTMENT OF THE ARMY,
Respondent

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD
In Case No(s) DC0752010009-I-1
This CAUSE having been heard and considered, it is
ORDERED and ADJUDGED: **AFFIRMED**

ENTERED BY ORDER OF THE COURT

DATED APRIL 2 2002

Jan Horbaly /signature/
Jan Horbaly, Clerk

Appendix K

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

RICHARD F. OLIVER
Appellant

DOCKET NUMBER
DC-0752-01-009-I-1
December 26, 2000

V.

DEPARTMENT OF THE ARMY,
Agency

SETTLEMENT AGREEMENT

THIS SETLEMENT AGREEMENT AND GENERAL RELEASE is made and entered into by and between Richard F. Oliver and the Department of the Army, (hereinafter referred to as Agency) in the interest of promoting efficiency.

WITNESSETH

WHEREAS, Mr. Richard F. Oliver is not currently employed by the Agency; and

WHEREAS, Mr. Richard F. Oliver and the Agency desire to settle fully and finally all differences between them embodied in this appeal before MSPB and all of the equal employment opportunity complaints Mr. Oliver has filed with the Army (BFARFO0012A0570 & BPARFO0012A0580) and the Equal Employment Opportunity commission which are based upon events dated before or on the date this Agreement is signed; to include complaints in which Appellant seeks to be the class agent:

NOW THEREFORE, in consideration of the premises and mutual promises herein contained, it is agreed as follows:

1. Neither this Settlement Agreement nor the incorporated general release shall in any way be construed as an admission by the Agency of any wrongdoing whatsoever against

the Appellant or any other person(s) or activity, and the Parties specifically disclaim any violation of any Federal or State statute or regulation including Title VII of the Civil Rights Acts of 1964 or 1991 as amended.

2. The Agency agrees to pay $20,000 as a lump sum for Appellant, (Check made payable to The Robinson Law Firm) within 60 days of the execution of this Agreement. Any claim for attorney's fees will be satisfied from the $20,000 lump sum payment to Appellant. Parties expressly agree that there will be no further claim for attorney's fee concerning the above referenced cases, or any other issue relating to above references cases, or any other issue relating to above references cases.

3. The Agency agree to allow Appellant the opportunity to resign, with the effective date of September 2, 2000, for personal reasons from federal service at HQ TRADOC and to remove from his Official Personnel File all references to his removal for misconduct. If Appellant's former supervisors or the Fort Monroe Civilian Personnel Advisory center are contacted by potential employers of Appellant, reference will be made to what is in the Appellant's Official Personnel File, i.e., Appellant resigned from federal service for personal reasons. It is the intent of the Parties that no one at HQ TRADOC will speak negatively of Appellant to a potential employer of the Appellant. However, the Parties agree that at HQ TRADOC records will be maintained documenting his misconduct for the purpose of enforcing this Agreement.

4. Appellant hereby agrees to withdraw with prejudice this appeal and all equal employment opportunity complaints based on events dated on or before the signing of the Agreement. Said withdrawal is considered automatic on the date of the signing of the last signature on this Agreement. Appellant further agrees that he will not file any other appeals or complaints against the Agency anytime hereafter with any other administrative boy, agency or court of law or equity based upon

the matters alleged to have occurred before this Agreement was entered into.

5. Appellant hereby agrees to never seek employment with the Department of the Army or any component thereof in the future. The Parties understand that this provision further precludes Appellant from working as a contractor, consultant, or in any other capacity for Agency. Should appellant ever work for the Agency, he agrees to pay back to the Agency 100% (plus reasonable interest) of the money received in this Agreement.

6. As a material inducement to the Agency to enter into this Agreement, Appellant irrevocably and unconditionally releases and forever discharges the Agency and its agents, employees, and representatives from any and all charges, claims, causes of actin, and demands, known and unknown, of any nature whatsoever which the Appellant now has against each or anyone concerning events dated before or on the date this Agreement is entered into.

7. Should any provision of this Agreement to be determined by any court or other tribunal to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected thereby and the said illegal or invalid part(s) shall be deemed not to be a part of this agreement.

8. This Agreement sets forth the entire agreement between the parties hereto and fully supersedes any and all prior agreement or understandings between the parties hereto pertaining to the subject matter hereof.

9. Appellant represents that he and his representative have thoroughly read this Agreement and voluntarily accept and agree t the terms and provisions herein. The Agency represents that the person signing for the Agency below has thoroughly read this Agreement, is authorized to act on behalf of

the Agency in settling this case under the foregoing terms, and that they voluntarily accept and agree t its provisions.

10. The parties agree to file this Agreement with the MSPB for enforcement purposes.

/s/ Richard F. Oliver 12/26/00 /s/ Bradley R. Hansen 12/26/00
RICHARD F. OLIVER DATE RADLEY R. HANSEN DATE
Appellant For the Agency
/s/Kenneth M. Robinson 12/29/00

KENNETH M. ROBINSON DATE
Counsel for Appellant

Appendix L

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

RICHARD F. OLIVER,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency

DOCKET NUMBER
DC-0752-01-0009-C-1

DATE: April 2, 2003

Ellen Dunn, Washington, D.C., for the appellant
Anthony A. Cochet, Esquire, Fort Monroe, Virginia for the agency

BEFORE
Edward f. Manning
Administrative Judge

INITIAL DECISION

The appellant filed a petition for enforcement of the Board's January 18, 2001 Initial Decision, which became final on September 5, 2001. Compliance File (CF), Tab 1. That decision dismissed his appeal as settled and approved the parties' settlement agreement for entry into the record in order to make it enforceable by the Board. Id. For the following reasons, the appellant's petition for enforcement is DENIED.

BACKGROUND

The appellant challenged the Administrative Judge's action dismissing the appeal as settled by first filing a petition for review (PFR) requesting that the settlement agreement be set aside and his appeal reinstated, and later petitioning the U.S. Court of Appeals for the Federal Circuit to Review the Board's PFR denial. See Oliver v. Department of the Army, 90

M.S.P.R. 28 (2001) (Table), aff'd, 33 Fed. Appx. 488(No. 02-3039) (Fed Cir. 2002).

The settlement agreement in this appeal provided, inter alia, that the agency would allow the appellant to resign for personal reasons and it would remove from his Official Personnel File all references to his September 2, 2000 removal for misconduct. AFI,[1] Tab 19. It also agreed to tell prospective employers that the appellant has resigned for personal reasons. Id.

> The parties settlement agreement also provided for the following:
> 2. The agency agrees to pay $20,000 as a lump sum for Appellant, (Check made payable to The Robinson Law Firm) within 60 days of the execution of this Agreement. Any claim for attorney's fees will be satisfied from the lump sum payment to Appellant....

AFI, Tab 19.
The agency filed a copy of the entire agreement with its response to the instant petition for enforcement. (CF, Tab 4, Exhibit 1.

In his petition, the appellant inferred that the agency breached the agreement by stating "(t)he agency has not responded to our request on the disposition of the agreement and settlement check." CF, Tab 1. In a subsequent filing, he further stated that "the agency failed to enforce the agreement as prescribed or respond to my request for information. I therefore request that the agreement be remanded back for processing at the stage it was when the settlement was signed." Id at Tab 2.

ANALYSIS AND FINDINGS

[1] The Board's record in the initial filing of this appeal is references as Appeal File 1(AFI).

The Board has broad authority to enforce the terms of a settlement agreement entered into the record. Se Joos v. Department of the Treasury, 74 M.S.P.R. 684, 694 (1997) Littlejohn v. Department of the Air Force, 69 M.S.P.R. 59,61 (1995). The Board interprets such agreements in accordance with contract law in order to carry out the parties' collective intent at the time the agreement was made. See Gesco v. Department of the Treasury, 852 F.2d 558, 561 (Fed. Cir. 1988); Spragan v. Department of Justice 70 M.S.S.P.R. 486, 494 (1996). In so doing, the Board enforces an agreement was made. See Greco v. Department of Justice, 70 M.S.P.R. 686, 494 (1996). In so doing, the Board enforces an agreement according to the plain meaning of its terms, See Kinney v. Department of the Interior, 30 M.S.P.R. 170, 172-73 (1986). However, if those terms are found to be ambiguous, ambiguity will be resolved in a manner that is consistent with the purpose and effect of the agreement and the intent of the parties. See Vaughan v. U.S. Postal Service, 77 M.S.P.R. 541, 546 (1998). In that regard, parol evidence will be admissible to determine the intent of the parties. See McDavid v. Department of the Army, 58 M.S.P.R. 673,676 (1993).

The party alleging noncompliance with a settlement agreement has the burden of proof by preponderant evidence as to that issue; however, when the appellant alleges noncompliance, the agency is expected to produce evidence and explanation concerning its efforts to comply with the agreement, and to respond to a petition for enforcement with evidence of compliance. 5 C.F.R. § 1201.183 (a)(1); see also Vallard v. U.S. Postal Service, 75 M.S.P.R. 75, 77 (1993). The agency's duty to produce evidence of compliance is triggered by the appellant's filing of a petition for enforcement, and is not dependent on a request by the appellant. See Jones v. Office of Personnel Management 61 M.S.P. R. 252,254 (1994).

In terms of remedies, the Board can impose sanctions as a means to enforce compliance with a final decision it has

issued, but sanctions should only be imposed when an agency has failed to exercise the basic due diligence expected of it in complying with an order or has exhibited negligence or bad faith in its efforts to so comply. See Collins v. U.S. Postal Service, 66 M.S.P.R. 531, 534 (1995). As applied to the enforcement of a settlement agreement, under contract law the party showing material breach of a settlement agreement has the option of enforcing the terms of the agreement or rescinding it and going forward with the original claim. See Collins v. U.S. Postal Service, 66 M.S.P. R. 531, 534 (1995). As applied to the enforcement of a settlement agreement, under contract enforcing the terms of the agreement or rescinding it and going forward with the original claim. See Arnold v. United States, 816 F.2d 1306, 1309(Fed. Cir. 1987); Spragan, 70 M.S.P.R. at 494. A breach of a settlement agreement is material when it relates to a matter of vital importance, or goes to the essence of the contract. See Carsen v. Department of Energy, 77 M.S.P.R. 453, 458 (1998).

The Board has found that allegations of noncompliance, regardless of the sanction requested, are properly heard in the first instance by an Administrative Judge. See Bilbraut v. Department of the Navy, 74 M.S.P.R. 1, 3 (1997). In so doing, an Administrative Judge can, in his discretion, afford the parties a hearing if such action is necessary to resolve disputed facts. See Vaughan, 77 M.S.P.R. at 549.

The agency answered the appellant's petition in a December 26, 2002 filing. CF, Tab 4. The agency stated that in January 2001 it remitted a check in the amount of $20,000 to the appellant's attorney in accordance with the terms of the settlement agreement. Id. At Exhibit 2. After the appellant filed his petition for review with the Board, his attorney returned the unnegotiated check to the agency on February 22, 2001 and advised the Board, on February 23, 2001, that he no longer represented the appellant. PFR File at Tab 3; CF, Tab 4, Exhibit 5.

After the Board issued its September 5, 2001 decision denying the appellant's petition for review, the agency stated it wrote to him, his former attorney and his new non-attorney representative, on September 13, 2001, requesting guidance as to whom the earlier remitted check should be sent. CF, Tab 4, Exhibit 6. The appellant responded on September 29, 2001, informing the agency that it had no right to provide copies of correspondence, addressed to him, to his former attorney. Id. At Exhibit 7. He also stated that he had "sixty days to appeal the MSPB decision and (the agency had) no right to advise me or seek information about the settlement check." Id. He also directed that further communication be directed to his new representative and that "(s)ince the MSPB has ruled that actions concerning my case were legitimate, please contact them for advice on what to do." Id.

After the U.S. Court of Appeals for the Federal Circuit affirmed the Board's denial of the appellant's petition for review on April 2, 2002, the agency recontacted the appellant, his former attorney, and his non-attorney representative, on April 16, 20002, and state it was prepared to reissue the $20,000 check. Id at Exhibit 8. It also sought guidance on how the funds were to be disbursed. Id. The appellant responded on April 20, 2002, stating that "(s)ince I still have rights to an appeal, your correspondence is inappropriate." Id at Exhibit 9.

I note that the appellant's representative filed a December 30,2002 request that the appeal be reinstated because the agency had failed to respond to the Board's December 11, 2002 Acknowledgement Order. CF, Tabs 3, 5. The appellant's filing also stated that "refusing to issue the payment as prescribed in the agreement is a material breach to the settlement." Id. At Tab 5.

The agency responded to the above with proof that its response to the Board's Acknowledgement Order was timely

served on the appellant and his representative by certified mail on December 26, 2002. CF, Tab 6. The agency also indicated that it had received no response from the appellant or his representative, concerning his intentions regarding the disbursement of the $20,000, since the appellant replied, as noted above, on April 20,2002. Id.

In sum, I find, based on the written record, that the agency has repeatedly attempted to comply with the agreement, by first tendering the $20,000 check in term 2 of the settlement agreement to the appellant's then attorney of record, and after it was returned by him directing the question of payment to the appellant himself, in writing on 2 subsequent occasions, in an effort to make said payment. These facts, asserted by the agency, have not been addressed, much less denied, by the appellant. Nor has the appellant shown that there was any misunderstanding between the parties, or that there were circumstances that caused him alone to possibly misunderstand the terms of the agreement.

Simply stated, I find the appellant's statement concerning the agency's alleged failure to pay the $20,000 to be frivolous.

I did not afford the appellant a hearing on the merits of this action. See Burford v. U.S. Postal Service, 56 M.S.P.R. 460, 463 n.2 (1993) (an appellant has no right to a hearing on a petition for enforcement, it is within the Administrative Judge's discretion to determine whether t hold one).

Based on my review of the complete record in this case I have, as noted above, concluded that the appellant has failed to establish that the settlement he entered into with the agency was breached. Furthermore, I note that there is no evidence of record that raises a question as to the agreement's validity.

DECISION

The appellant's petition for enforcement is DENIED.

FOR THE BOARD /s/ Edward F. Manning
Edward F. Manning
Administrative Judge

Appendix M

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

RICHARD F. OLIVER, Appellant,

DOCKET NUMBER
DC-0752-01-0009-I-1

v.

DEPARTMENT OF THE ARMY

DATE: November 6, 2000

RESPONSE TO STATUS CONFERENCE SUMMARY

Documentation to support affirmative defense

In response to the Status Conference Summary dated November 6, 2000, the appellant provides the following supporting documentation of Title VII violations. The agency exceeded the bounds of reasonableness based on its own policy and practices. Additionally, the agency in cooperation with a union officer (not duly and properly elected) improperly terminated the appellant's union dues and membership, to deny him Title VII protection as union member.

As directed, the following examples involving white employees on (1) improper use of e-mail, (2) improper use of government equipment,(3) promoting and operating a private business on a government facility, (4) and improper use of leave are provided. These cases show that white employees are treated differently than the appellant for similar offenses. Most examples involve supervisors, who set the pattern of conduct in the work place. These cases are documented in EEOC government investigations, Federal civil trials, and MSPB hearings and reflect agency leadership position on the

application of Title VII prohibitions to personnel practices within the agency. Further, Army regulation 11-2 (Exhibit 1) and Department of the Army, Deputy Chief of Resource Management slide on internal controls (Exhibit 2), set forward guidelines on accountability for waste, fraud, and abuse committed by supervisors. The supervisors/team leaders in these cases were not held accountable in any of the aforementioned situations. Each organization must have checklists and assessment of compliance. This did not occur for LTC or Mr. Louis Napoleon, (GM-15) Assistant Deputy Chief of Staff for Doctrine.

The penalties also must be reasonableness to preclude supervisors from using reprimands as reprisal actions against employees. The following excerpt for TRADOC personnel web site, http://www.cpol.army.mil/permiss, describes the conditions under which agency personnel reprimands should be applied (See Exhibit 3). The following list of penalties is prescribed in order of severity for administrative reprimands:

- Oral admonishments/Written Warnings
- Reprimands
- Suspensions from duty and pay status
- Involuntary reductions in grade and/or pay (in some cases)
- Removals

With the exception of misuse of government property, LTC Brenda Harris used undocumented oral admonishments, without counseling, and no history of pattern, to support proposed removal. While the army represented a no tolerance attitude on waste, fraud, and abuse, supervisors were creating and supporting a work environment where waste, fraud, and abuse were tolerated and promoted for white employees.

Prior EEO Activity

Dr. Oliver filed a complaint in 199____ for non-selection of a promotion based on race. That individual complaint help organize African-American to form an agency wide discrimination complaint in 1996 based on discriminatory promotion policies. Ellen Dunn was the class agent. However, Dr. Oliver was active in organizing other African-Americans, working with legal groups and participating with civic organizations. Dr. Oliver was a member of the class group and included on the list of witnesses against the agency. This class complaint was on going for five years. While, Ms. Dunn and others like Dr. Oliver were unsuccessful in getting the class certified, Ms. Dunn won her complaint (see Exhibit 4) and inspired Dr. Oliver to continue the battle. The agency was well aware of his EEO activities. During the trial evidence was presented showing that management targeted and treated minorities involved in EEO activity differently.

Under the improper use of leave category, the agency documented three violations against the appellant. Under the first violation, the supervisor includes a charge that Dr. Oliver was 15 minutes late on one occasion. There was no documented history of lateness, no memorandum of record documenting Dr. Oliver's counseling session, and he signed for leave. LTC Harris failed to counsel Dr. Oliver or document the incident as personnel reprimand. Not only is the agency action unreasonable, since Dr. Oliver properly signed for leave, there is no basis to include this violation under LTC Harris' proposed termination. Further, LTC Harris treated Mrs. Leslie Bugler a white employee differently when she was late. LTC Harris excused Mrs. Bulger from being occasionally late while including Dr. Oliver's case in a proposed removal action. Mrs. Bulger came to work late on the following dates with LTC Harris's knowledge: 14 August 2000- ten minutes late; and 15 August 2000- 15 minutes late. LTC Harris discriminated against Dr. Oliver based on race and sex, by treating him differently than Mrs. Bulger, who is a white female. The supervisor also retaliated against him for prior EEO activity by treating him in an unreasonable manner and creating a hostile

work environment. Dr. Oliver apprised LTC Harris of her discriminatory practices.

The second violation involved a AWOL charge for using unapproved leave. LTC Harris established a practice of having employees send her e-mails documenting requests, changes, and use of leave. An example of a request for leave that used and accepted without formal approval involved an e-mail, dated 16 May 2000 for leave 3-6 Jul 2000, included as Exhibit 5. He was properly charged annual leave. LTC Harris promoted a practice of leave usage through e-mail notification without requiring her formal approval and then used the practice to discriminate against Dr. Oliver when he filed an EEO complaint against LTC Harris. Documentation on the filing of an EEO complaint is provided as Exhibit 6. During their meeting, LTC Harris' demeanor was hostile and confrontational. When asked to put her policies, which should apply to everyone, in writing. LTC. Harris refused. Again, LTC Harris did not document by Memorandum for Record, what was said during the meeting or issue written policy guidance. Captain Hicks and Mrs. Bulger (white employees) also sent e-mails to notify LTC Harris of request and use of leave without requiring a formal response.

The third unauthorized leave case involves a charge of AWOL against Dr. Oliver

for being away from his desk for 45 minutes. Both LTC Harris and Colonel Redmond based their decision on a oral quote from Mr. Headen included in the Decision on Proposed Removal, which states "Mr. Headen informed her that the meeting lasted until just after 1000 hours". There is no written statement from Mr. Headen on the time or memorandum from LTC Harris reporting when she contacted the EEO Office to secure the time of the meeting. Just after 1000 could be anytime from 1000 to 1015. Further, the EEO Office is approximately ½ mile from Dr. Oliver's Desk. 15 minutes to 30 minutes would be a more reasonable period of time for someone to walk that distance. In addition, unless LTC Harris indicated the reason for her inquiry, it is not reasonable for someone to report a short conversation

with a co-worker or trip to the bathroom. The fact that neither LTC Harris or Colonel Redmond (both white) bother to interview Valerie Doe African-American, reflects the racial climate in that organization. LTC Harris was informed of the circumstances during a dense and confrontational meeting. LTC Harris did not contact Valerie Doe or provide a memorandum for record explaining how Dr. Oliver violated TRADOC or DCST personnel policy by his actions. LTC Harris' conduct continued to support a tense and hostile work environment for Dr. Oliver. African-Americans should not have to sign for leave when away from their desk 4-30 minutes talking to other African-American employees, unless that same standard is applied to white employees. It is not and the continued pattern of separate and unequal treatment promotes a hostile work environment for Dr. Oliver.

The agency also charged Dr. Oliver with inappropriate use of e-mail. Dr. Oliver used e-mail to sent out information on a non-profit organization in accordance with TRADOC Memo dated 22 April 1997 (Exhibit 7). This e-mail note (Exhibit 8) was not in violation of any TRADOC policy. However, if LTC Harris chose to override that policy, she failed to document the new policy in writing or issue a memorandum for records on how Dr. Oliver violated existing TRADOC policy. The agency was appraised of Dr. Oliver's use of e-mail and the TRADOC policy. Both the LTC Harris, in her proposed termination notice, and Colonel Redmond in the termination process termination refused to acknowledge the mistake and continued to promote a hostile work environment because of his EEO activity.

The final charge concerns improper use of government equipment. . As charged, Dr. Oliver did not alter the document, for which he is charged. An Information System Officer can easily determine when a document has been altered or changed. There is a computer record of how word processing documents are altered. The agency has refused to present any evidence that Dr. Oliver altered the document on the hard drive. Dr. Oliver did copy a document to the hard drive to review but did not

work on the document. The agency did not conduct a proper chain of custody to document his misuse of his computer. There is evidence from Ellen Dunn's Federal trial against TRADOC in Norfolk in June 1999, that Army used improper and illegal procedures against African-Americans in documenting charges of misconduct. Dr. Oliver did not promote his private business in this situation. Dr. Oliver was properly reprimanded for promoting his business, even though the same standard was not applied against others including LTC Goodwin white male) who brought a commercial vending machine into the TRADOC Chief of Staff's office building (building No. 133) and sold sodas and other sundry items for over a year without authorization. The agency uses different standards of conduct based on race.

Under the employee relation's section of TRADOC personnel policy, the following policy is presented, " In hearing the oral reply, you should make notes of the points presented and summarize them in a Memorandum for Record (MFR) of the meeting. The employee and his/her representative must be given a copy of this MFR and it is good practice to have the employee sign that the MFR represents the substance of his/her oral reply. At no time during the pre-decision stage may you make comments, commitments, or observations which would indicate either that you have made a decision or are predisposed in either direction". In each situation, LTC Harris conducted the meetings in an informal manner. LTC Harris did not document by memorandum of record any of these oral meetings. Dr. Oliver, while concerned by her hostile and racist manner, did not feel that his actions had approached an oral reprimand. During these meetings, Dr. Oliver made LTC Harris aware that he was concerned about her treatment of black versus white employees. Dr. Oliver advised LTC Harris that with the proper documentation an EEO investigation would independently look at treatment of white employees versus African-American employees by LTC Harris. LTC Harris had every opportunity to properly apply TRADOC personnel guidelines, document her concerns in memoranda of record (secure his signature) and she

refused to do. TRADOC policy provides for oral admonishment/oral reprimand, suspension, involuntary reductions in grade and pay, or removal as adverse action options. An oral admonishment /oral reprimand is the least severe of agency adverse action but requires documentation through a memorandum for record. Because Dr. Oliver did not receive the requirement for the least severe adverse action, application of the most severe adverse action is unreasonable. In additional, shifts to more severe actions are normally supported by a history of repeated conduct. Dr. Oliver did not modify or change the document that the agency referred to on March 14, 2000. However, it is common practice for employees to use their computer for personal use when it does not interfere with work. Civilians are frequently requested to use government computers for community or other activity. Other white employees do personal work on their computer. Mr. Ron Romero, supervisor was reported by Dr. Oliver for improper use of computer equipment. Under the Army Regulation 11-2 and ODCSRM guidelines for waste, fraud, and abuse, specific guidelines in the form of checklists are used to monitor and hold violators accountable. No action was taken against Ron Romero, GS-13, even through charges were filed through a union action.

There is no provision in the United States code for excluding 1750, Instructional Systems Specialist job series from the bargaining unit or establishing a status where agencies can make Federal employee eligible to belong to a bargaining unit but exclude them paying dues. The union contract does not specify that his job series be excluded from the union bargaining unit. The Instructional Systems Specialist series is a Department of the Army program, which has not been identified for exclusion from union bargaining unit. Exhibit 9 shows a union classification code, which is not consistent with the United States Code on bargaining unit membership. Dr. Oliver did not authorize the agency to stop paying union dues. As a former union steward, he had protection from activities conducted by the agency. Exhibit 10 includes examples of e-mails and correspondence to Tommy Ball and other union

representative Exhibit 11 includes a copy of the union contract, which does not prohibit Dr. Oliver's series from being a member of the bargaining unit. The TRADOC union R-12 in twenty years has never had a union president duly elected to office. The union is also charged with acting in collusion with the agency to violate Dr. Oliver's civil rights.

A. Disparate Treatment

1. Jane Gregory, a former TRADOC employee, admitted under oath during Ellen Dunn's federal trial in Norfolk, Virginia (June 1999) that she had personal correspondence for her attorney on the government's computer. In addition, she had other personal records on the hard drive not related to work or other authorized activities. The agency leadership removed the incriminating evidence from the computer during the trial. However, copies had been downloaded and submitted on the plaintiff's behalf prior to its removal. There was no action taken by the agency against Ms. Gregory currently promoted to a GS-13 on the Headquarters, Department of the Army Staff. Jane Gregory is white.

2. LTC Michael Goodwin, a former TRADOC action officer, admitted under oath during Ellen Dunn's federal trial that he brought a commercial vending machine from his business into the TRADOC Chief of Staff office building and kept it there for over a year and sold sodas and candy to employees. There was a TRADOC Inspector General (IG) investigation conducted concerning validating the charges and a request for a HQ DA IG follow-up on the TRADOC IG investigation prior to his admission. No action was ever taken by the Department of the Army concerning LTC Michael Goodwin's conduct. LTC Goodwin also admitted during the federal trial that he download records from Ellen Dunn's computer without authorization. The army took no action concerning LTC Goodwin's testimony. LTC Goodwin is white.

LTC Goodwin's conduct concerning the conduct of his personal business on government property is also documented in an OCI investigation conducted in August 1998.

3. Mr. Louis Napoleon(GM-15, Assistant Deputy Chief of Staff for Doctrine, TRADOC, used government e-mail to send Happy New Years Greetings to government and private business associates. He also used this message to discriminate against African-American involved in EEO activity. He deliberate excluded four African-Americans involved in a class action from this government message and advised one member that she was excluded because of her EEO activity. Mr. Napoleon's action was reported to his rater General Buckley. Because of his bias, the four class members asked that he be removed as senior rater. The general refused to take any action against Mr. Napoleon. It was also uncovered during an OCI investigation that Mr. Napoleon gave an outstanding performance appraisal to an African –American secretary that he did not supervise, because she was not involved in the class action.

Termination Assessment

LTC Harris, who proposed termination decision failed to consider any of the evidence presented. Colonel Redmond, who made the final decision on termination followed the same pattern of conduct. It was evident during the meeting that Dr. Oliver had with Colonel Redmond to discuss final action that Colonel Redmond had already made up his mind. After that meeting, in which oral evidence was presented, Colonel Redmond failed to document the meeting or evidence presented and provide a copy to the appellant to ensure that all evidence was considered. A report was issued after the appellant filed discrimination charges with the MSPB to meet the administrative requirements. This pattern of conduct is also consistently applied against other African –American engaged in EEO activity.

Class Action

The MSPB also accepted a charge that there is a pattern of disparate treatment in using termination as discriminatory and reprisal actions against African Americans, actively involved in EEO. Dr. Oliver has identified three other African-Americans who were terminated because they were very active in EEO activity and treated differently from white employees. Dr. Oliver and other TRADOC employees are not aware of any white employee that has been terminated. Dr. Oliver has also presented evidence of disparate treatment. The complete statistical information has been requested through discovery but it has not been received from the agency.

Conclusion

The appellant has provided evidence of prior EEO activity with the agency's knowledge to support the basis for Title VII violations. As directed, the appellant has provided evidence of the unreasonableness of the actions, incorrect application of agency policy, and specific examples of white agency employees, including supervisors, who were treated differently for similar infractions. The appellant has provided evidence of inappropriate conduct with the union to further violate his employment rights. The agency has refused to provide discovery documentation requested. We charge that the Army knowingly uses their authority to systematically abuse African-Americans, who actively engage in EEO activity. We request that the MSPB provide a provisional certification of the requested class for all African-Americans employed by the Department of the Army, who have been terminated, while actively engaged in EEO activity from 1990 to present. This action will force the activity to provide the requested information to disprove the charges.

Appendix N

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT
OLIVER V. ARMY
No. 02-3039
Informal Brief of Petitioner Continuation Sheets

2. Did the MSPB or arbitrator incorrectly decide or fail to take into account any facts? X Yes _ No . If so, what facts? (Refer to paragraph 7 of the Guide.)

Even though I had an attorney, I personally responded to all of the administrative deadlines including requesting discovery with the assistance of former co-workers. I responded to the administrative judge's requirement for a response to the judge in support of my defense. I also received and fully complied with the agency's discovery request. The agency accepted my discovery response without comment or requesting additional information. Since I had a dispute with my attorneys during the discovery process, I sent an e-mail advising them that I wanted and was entitled to discovery regardless of any settlement discussions, which I included in my petition for review. I also specifically asked my attorneys to advise me and seek consent, if they were waiving my rights. That notice was sent by e-mail on November 28, 2000. Since I did not receive a response to my request for discovery from the agency, I personally contacted the judge to compel discovery and outlining the value and relevance of the discovery to my defense. The judge reviewed my discovery request and issued an order to compel the agency's response. I also contacted the judge and gave him phone numbers to personally contact me about the discovery request. I followed the guidance on the MSPB application, which states that I am personally responsible for making sure that my representative or I participate in all conferences set by the administrative judge. The judge set up a discovery conference, with my attorney and the agency attorney, without my knowledge or consent. Based on that conference, the judge, appellant attorney, and agency attorney decided to

withdraw the order to compel discovery to support my defense. However, the judge had already allowed the agency full and complete discovery from me on my appeal. Neither my attorney nor the judge informed me, that my right to material discovery was terminated. I did not waive that right. When I sent a request to the judge to proceed to a hearing because settlement efforts were unsuccessful, I received no communication from the judge. Instead, my attorney contacted me and advised that the judge terminated my right to discovery to promote settlement of my case. I never received any communication from the judge.

My attorney also contacted me and threatened to withdraw his representation if I continued to contact the judge, Ellen Dunn, or Phyllis Dudley. Ellen Dunn and Phyllis Dudley are two former co-workers, who had helped me file my administrative pleadings and had material evidence to support my defense. Without discovery and based on my attorney's threats and comments I had no choice, but agree to settle under the agency terms. I could not successfully win a favorable ruling or negotiate a fair settlement without the discovery or support from my attorney. I also received a notice from the agency indicating their position should we proceed to hearing. It was clear that without discovery to support my defense, I would lose the hearing so I agreed to settlement under duress. The lack of discovery forced me to accept any terms that the agency offered. The settlement agreement negotiated by my attorney and the agency attorney (labor counselor) involved retention of files concerning my termination to enforce the settlement agreement, issuance of a check for $20,000 to the Robinson law firm, waiver of any attorney's fees as costs, and a waiver of rights to ever seek employment with the Department of the Army or any component thereof in the future. The agreement further stated that the provision precludes me from working as a contractor, consultant, or in any other capacity associated with the agency. If I violated the settlement, I would be penalized financially. However, the agency would suffer no penalty if they violated the settlement.

The day that I signed the settlement agreement, my attorney directed me to meet with the agency attorney alone without any other representation. My attorney did not fax me a final copy of the settlement agreement with his initials to ensure that I had the settlement terms that we had agreed upon. During the settlement meeting, I had a dispute with the government attorney over the terms of the settlement. I insisted that the government attorney make a long distance call to my attorney so that I could discuss the dispute. The attorney did not leave the office during our phone conversation and my attorney insisted that there was nothing that he could do and under the circumstances that I should sign. He assured me again, that there was nothing wrong with issuing the check directly to him. He advised that the administrative judge would not approve the settlement, if the payment were not issued in the appropriate manner. Because my lawyer had recently won a case for a former co-worker, was a former U.S. Attorney, and had been in practice for thirty years, I trusted him.

Subsequently I received a notice from the administrative judge indicating that my attorney's signature was needed to make the settlement agreement legal. I was not aware that I could rescind my signature on the agreement, because the agreement had not been executed in accordance with the guidance in Management Directive 110. The Management Directive has the attorney reviewing and signing the agreement first, then the complainant, and finally the duly authorized agency representative. The agency did not follow policy guidance. While this agreement was being negotiated, I was required by my attorney to send a letter to the judge to have no further communication with the judge. This is an MSPB appellate right that I have, which my attorney coerced me into giving up. After the attorney withdrew my right to material discovery, I had to settle or accept termination status on my personnel records. I could not win the case without discovery. When I received a copy of the agency's rehearing submission

dated December 22, 2000, I realized that I had been denied due process and my right to material discovery. I was forced into a settlement because my rights to a defense through material discovery had been terminated. Without a defense and without the discovery I could not defend myself. After signing the agreement, I confided to my family what had happened and they encouraged me to contact the friends, who had initially helped me file the appeal. After notifying my attorney, who sent me a copy of the check, I validated that the payment to the Robinson Law Firm appeared not to be issued as a settlement payment, and the documentation supported that the $20,000 payment was made for services from the Robinson Law Firm. There was no power-of-attorney agreement authorizing my attorney to receive monies on my behalf and there was no legal agreement giving my attorney fiduciary authority over my settlement monies.

After signing the agreement, the administrative judge sent an order stipulating that the agreement did not become final until my attorney signed it. To the best of my knowledge, there is no long distance telephone call or fax record of any communication between my attorney and myself after I signed that agreement. My attorney did not contact me to ensure that I understood the terms of the agreement that I had signed.

After reviewing the circumstances of the settlement and MSPB regulations, I determined that I had the same right to discovery that the agency was afforded before entering into settlement discussions, the judge had denied me due process, the settlement agreement authorized a $20,000 check to my attorney after my attorney cancelled my request for discovery (without my knowledge) was illegal, the settlement check was not properly issued, and the settlement terms were not legal. Ellen Dunn gave me an affidavit, with independent corroboration of evidence to support my petition. The inherent bias in the appeal and appeal review process by the MSPB, is also reflected in 2001 GAO study of Title VII complaints that determined that agencies win 99% of all EEOC and MSPB hearings and appeals

on Title VII complaints. Statistically, the probability of Federal agencies prevailing 99% of time is zero. Taken into consideration that 30% of the cases are settled does not explain the statistical bias in the 99% agency win rate. I filed my petition for review timely on February 17, 20001.

Appendix O

3. Did the MSPB apply the wrong law? _X_ Yes ___ No. The MSPB did not acknowledge any legal violations discussed in petition.

My petition raises issues of whether judicial bias, violation of due process, fraud, and misrepresentation caused me to sign the agreement. See Mueller, 76 F.3d at 1202-03; Taylor v. United States, 591 F.2d 688, 692 (Ct. Cl. 1979) ("the fact that an employee is faced with an unpleasant situation or has to choose between two unpleasant alternatives does not make the resulting action involuntary unless there is deception, coercion, duress, time pressure or intimidation"). The attorneys and the judge engaged in deception, coercion, duress, and intimidation to pressure me into the settlement agreement.

Richard Oliver alleges that the board erred in failing to accept the petition for review and re-instating his appeal because the administrative judge had not made an error in law or regulation that affects the outcome. Clearly, Richard Oliver's right to a voluntary settlement were violated through out the process by all parties.

During the administrative stage of the appeal, the appellant responded to all administrative requirements including requesting discovery. His attorney and the administrative judge excluded Richard Oliver from a critical discovery conference, after he personally requested the judge compel discovery and provided his phone number to be contacted. The appellant's discovery request was designed to respond to the administrative judge's order on proof of disparate treatment. In addition, the appellant had fully complied with the defendant's discovery requirements. However, the appellant was denied due process before being pushed into the settlement process.

Neither the attorney nor the judge informed the appellant that his right to discovery was being terminated. The judge did not respond to the appellant's request for information about the settlement process. Instead, his attorney contacted him and informed him that his right to discovery had been withdrawn, he would not be able to defend himself, Ellen Dunn was not a credible witness, and that settlement was his only option. The negotiated settlement agreement offered allowed the agency to keep records of the appellant's proposed misconduct, prohibited Mr. Oliver him from working for the agency or associated contractors forever, waived attorney's fees with a $20,000 check issued to the attorneys for the appellant. However, the appellant did not have a power-of-attorney or other legal instrument to reflect a fiduciary relationship with the attorneys. The appellant had to sign the settlement and remain in termination status. Dr. Oliver did not have an option. Without discovery, he could not support his defense and he had no other corroboration for the witness's testimony. The judge's order making the attorney a third party to the settlement agreement and failure to communicate with the appellant's during the appeal, misled Dr. Oliver concerning the attorney's role in the process. Dr. Oliver's. The board's decision that the administrative judge made no error in law or regulation that affects the outcome reflects a systemic bias in MSPB decisions and review and a misapplication of the law on voluntary settlements. The violation of appellant's rights to due process and appeal rights clearly made the settlement agreement involuntary. The ruling should be reversed.

A settlement is presumed to be voluntary, and an employee who freely signs a settlement agreement and voluntarily resigns has no right to appeal to the Merit Systems Protection Board unless the settlement and resignation is found to be involuntary. Mueller v. United States Postal Serv., 76 F .3d 1198, 1201 (Fed. Cir. 1996). Richard Oliver appealed to the MSPB within the specified time limit, that his settlement was involuntary and he was exercising his right to reinstate his

appeal. The courts have accepted as a general standard of proof, that voluntariness on the basis of coercion requires the appellant to show (1) the agency effectively imposed the terms of the settlement agreement on Dr. Oliver because they pursued the hearing based on in the initial termination notice if Dr. Oliver failed to sign; (2) Dr. Oliver had no realistic alternative but to resign and sign the settlement agreement because his rights to discovery to support his defense had been withdrawn; Dr. Oliver's resignation and settlement was the result of improper acts by the Army. Improper financial compensation was authorized to the appellant attorney to mislead Richard Oliver about discovery and coerce the appellant into signing the agreement. The standards of proof for involuntariness in Fruhauf Southwest Garment Co. v. United States, 111 F. Supp. 945, 951 (Ct. Cl. 1953); McGucken v. United States, 407 F. 2d 1349, 1351 (Ct. Cl. 1969). The judge stipulated the attorney's signature was required, even though attorney's fees were waived and the attorney had no legal instrument supporting his fiduciary responsibility to receive monies for the appellant.

The three-part Fruhauf standard should be applied to the circumstances of this case. The key issue that a court should consider is whether the settlement process was so coercive that a reasonable person in the employee's position would feel compelled to settle. Middleton v. Dept of Defense 185, F. 3d 1374, 1379 (Fed. Cir. 1999) states ("The employee must present allegation of fact which, if proven, establish that a reasonable employee confronted with the same circumstances would feel coerced into resigning."); Freedom of choice is the guiding principle in an involuntariness determination. It is clear that Richard Oliver did not have free choice when he made his decision. His choices were removed through denial of due process to have discovery. It is also clear that he was adversely affected by the agreement, which forced him out of the agency and any contractor job forever, waived costs, kept negative information on Richard Oliver's record, and provided him no direct financial compensation. Since the law provides that an

employee must be compensated for the waiver of his employment rights, the agency indicated in the settlement agreement that the check issued to the Robinson Law Firm represented settlement monies. The check was issued directly to the law firm with no notation or indication that the appellant would receive any of the funds. There was no power-of-attorney or other fiduciary agreement supporting issuance of the check. While EEOC Management Directive 110 procedures provide for including a lump sum total in the settlement agreement, it is not stipulated in the federal statute. Additionally, an employee is entitled to know the net amount of money that they will receive from a settlement. Further, if the attorney's fees are waived, the attorney no longer has an interest in the check issued by the agency. The attorney's taxable fees should only be combined with the employee's non-taxable compensatory damages if the attorney cannot determine the total of his fees, which was not true in Richard Oliver's case. In return for issuing a $20,000 check to the attorney, the attorney apparently cancelled Richard Oliver's right to discovery and withheld the information from him.

The appellant also alleges judicial bias by the administrative judge. The administrative judge's behavior was so prejudicial that it denied Richard Oliver a fair appeal process and voluntary settlement. United States v. Logan, 998 F .2d 1025, 1029(D.C. Cir). Our systems require that a judge remain a disinterested and an objective party in the administrative proceeding. However, the judge's conduct showed a partiality to the agency and bias against the plaintiff by allowing the agency discovery rights and denying them to Richard Oliver. Richard Oliver also contends that a judge has a "duty to prevent improprieties during the trial," Logan, 998 F.2d at 1029(quoting United States v. Warner, 955 F.2d 441, 449 (6th Cir.), cert. Denied, 112 S. Ct 383 (1992)). A review of the complete record will validate my contentions. Further, the administrative judge cannot force the appellant into settlement discussions, by denying discovery and refusing to communicate with appellant. him.

Appendix P

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD F. OLIVER,
Appellant,

DOCKET NUMBER
DC-0752-01-0009-C-1

v.

DEPARTMENT OF THE ARMY,
Agency

DATE:
JANUARY 12. 2004

Ellen Dunn, Washington, DC for the appellant.
Anthony A. Cochet, Esquire, Fort Monroe, Virginia, for the agency

BEFORE
Neil A. G. MCPhie, Acting Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed as petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulations that establishes this standard of review is found in Title 5 the Code of Federal Regulations, section 1201.115(5C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that effects the outcome. 5 C.F.R. § 1201.115(d).

Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
For the Federal Circuit
717 Madision Place, N.W.
Washington, DC 20439

The court must receive your request for review no later 60 calendar days after your receipt of this order. If you have representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See Pinat v. Office of Personnel Management, 931 F. 2d 1544 (Fed.Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. If is found in Title 5 of the United States Code, seciton 7703 (5 U.S.C. § 7703), You may read this law as well as review the Board's regulations and other related

material at our we site,
http://www.mspb.gov/mspb_library.html.

For the Board:

/S/ Mathew Shannon for
Bentley M. Roberts, Jr.
Clerk of the Board

Washington DC

Appendix Q

15 January 2004

Office of the Staff
Judge Advocate

Mr. Richard F. Oliver
P. O. Box 127
Upper Marlboro, Maryland 20773

Re: Oliver v. Depart. Of the Army
MSPB Docket No.: DC-02-075-01-0009-C-1

Dear Mr. Oliver:

Today I received a copy of the MSPB's Final Order on your appeal captioned above. Though I am sure you have also received a copy, I am enclosing a copy of the Order with this letter. Based on the latest Board's ruling in your case, I am writing to advise you that HQ TRADOC is again prepared to forward the $20,000 agreed to in the settlement of your MSPB & EEO cases to whatever address you specify. Your previous attorney, Mr. Kenneth Robinson, has advised both you and the agency that the check should be made payable to and remitted directly to you. If you will kindly advise me as to where you would like your check mailed, I will have our Resource Management office work with DFAS to have a check dispatched to you.

Thank you in advance for your cooperation in this matter. If you have any questions or wish t discuss how you

wish these funds transmitted to you, please do not hesitate to call me. My phone number is 757-788-2773. My mailing address is: Anthony A. Cocchet, Office of the Staff Judge Advocate, HQ TRADOC, Attn: ATJA, Fort Monroe, VA 23651.

Sincerely,
/S/ Anthony A. Cochet
Anthony A. Cochet
TRADOC Senior Labor Attorney

Enclosure

cc:
Ellen Dunn
OPM
MSPB
Office of Special Counsel